No. 79-1816

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In the Supreme Court of the United States

OCTOBER TERM, 1979

METHODIST HOSPITAL OF KENTUCKY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that the Hospital violated Sections 8(a)(3) and (1) of the National Labor Relations Act by refusing to hire former strikers as new employees because of acts of strike misconduct, without identifying any particular striker as having engaged in such misconduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-35) is not yet officially reported. The decisions and orders of the National Labor Relations Board (Pet. App. 36-102) are reported at 221 N.L.R.B. 692 and 227 N.L.R.B. 1392.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1980. The petition for a writ of certiorari was filed on May 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. 151 *et seq.*, are set out at Pet. App. 103-106.

STATEMENT

1. Petitioner Methodist Hospital of Kentucky, Inc. (the Hospital) operates a non-profit hospital in Pikesville, Kentucky, which serves as a regional medical center for a large and sparsely populated section of Eastern Kentucky and for adjoining areas in Virginia and West Virginia (Pet. App. 37; A. 192-193). In late 1971, the Communication Workers of America, AFL-CIO (the Union) requested that the Hospital recognize it as the collective bargaining representative of Hospital employees, asserting that over 90% of the employees had applied for Union membership (Pet. App. 53; A. 379). The Hospital denied the request on the ground that union representation was "not consistent with the purposes of the institution" (Pet. App. 53; A. 380-381).[1] In the spring

[1]Non-profit hospitals were exempt from coverage under the National Labor Relations Act prior to the enactment of the Health Care Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395 (Pet. App. 17-18, 42; A. 117-118).

of 1972, the National Labor Relations Board dismissed for lack of jurisdiction a Union petition seeking certification as the representative of the Hospital's non-professional employees (Pet. App. 53; A. 383-386).

On June 10, 1972, approximately 200 of the Hospital's over 400 employees went on strike in support of the Union's demand for recognition as the non-professional employees' collective bargaining representative (Pet. App. 42, 55-56; A. 118-119, 253, 248, 390, 371). During the strike, which continued for over two years (Pet. App. 18, 42; A. 118), unidentified individuals engaged in acts of violence and other serious misconduct (Pet. App. 22, 60; A. 224-225, 244, 207, 229-230, 226). Although it reinstated 37 strikers who applied for work during the strike (Pet. App. 22, 57; A. 218, 257-258, 167-168, 366), the Hospital denied reinstatement to all strikers who applied for work after the strike ended, on the ground that they had been terminated before the Hospital became subject to the Act (Pet. App. 56-57, 64-65; A. 210-213, 237, 451).[2] The Hospital also refused to rehire strikers who applied for work as new employees, on the dual grounds that there had been misconduct during the strike and that Hospital personnel policy forbade reemployment of any employee who left the job voluntarily without notice (Pet. App. 56-58; A. 220-223, 287-289, 406-428, 236-237, 241, 251-253, 207-209).

2. In response to the Union's unfair labor practices charge, the Board found that the Hospital had violated Sections 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by denying reinstatement to the strikers (Pet. App. 64-72, 42-43). In addition, the Board found that the Hospital had discriminatorily refused to hire the strikers

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[2]The Health Care Amendments went into effect on August 25, 1974. The strike was discontinued on October 10, 1974.

as new employees, in violation of Sections 8(a)(3) and (1) of the Act (Pet. App. 43-44). The Board ordered the Hospital to cease and desist from these and other violations of employees' rights under the Act, to offer reinstatement to the strikers with backpay, and to post customary notices (Pet. App. 44-45, 74-102).

3. The court of appeals rejected the Board's finding that the Hospital violated the Act by denying reinstatement to strikers (Pet. App. 25-31, 32-33), but upheld the Board's finding that the Hospital discriminated against the strikers as new hires, in violation of Sections 8(a)(3) and (1) (Pet. App. 31-32). It then enforced the Board's order as modified.[3]

With respect to the Hospital's contention that it was justified in denying new employment to strikers because of strike misconduct, the court stated (Pet. App. 22-23; citations omitted):

> Our review of the record confirms the hospital's claim that there was substantial evidence of violence and misconduct in connection with the strike. * * * The difficulty, however, is that the proofs fail to identify any particular miscreant and the hospital has specifically declined to offer such proof.
>
> * * * * *
>
> While we would have no difficulty upholding a company decision to refuse employment to any person who was shown to have participated in the more egregious forms of unlawful conduct shown by the

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[3]The court also upheld the Board's finding that the strike notice requirements of Section 8(g) of the Act, 29 U.S.C. 158(g), do not apply to strikes that began prior to the effective date of the Health Care Amendments (Pet. App. 20-22, 32). Although petitioner took a contrary view below (Pet. App. 19-20), it does not press that claim here.

proofs here, it is clear that the company has specifically declined to attribute any specific act to any specific employee, preferring to rely upon general allegations of misconduct. At the same time we are unwilling upon these proofs to disturb the well settled rule in our circuit that the vicarious imposition of sanctions for violence will not be enforced absent proof that a particular individual was engaged in the unprotected activity.

ARGUMENT

Contrary to the Hospital's contention (Pet. 11-13), the Sixth Circuit's conclusion that strikers may not permanently be denied employment because of unattributed acts of strike misconduct is in accord with settled authority. See in addition to the authorities cited by the court of appeals (Pet. App. 23), *NLRB* v. *Sea-Land Service*, 356 F. 2d 955, 966-967 (1st Cir.), cert. denied, 385 U.S. 900 (1966); *NLRB* v. *Valley Die Cast Corp.*, 303 F. 2d 64, 66-67 (6th Cir. 1962); *Advance Industries Division-Overhead Door Corp.* v. *NLRB*, 540 F. 2d 878, 883 (7th Cir. 1976); *NLRB* v. *Wichita Television Corp.*, 277 F. 2d 579, 585 (10th Cir.), cert. denied, 364 U.S. 871 (1960); *Int'l Ladies' Garment Workers Union* v. *NLRB*, 237 F. 2d 545, 551-552 (D.C. Cir. 1956).

The cases relied on by the Hospital (Pet. 11-12) do not point to a different conclusion. In *Johns-Manville Products Corp.* v. *NLRB*, 557 F. 2d 1126 (5th Cir. 1977), cert. denied, 436 U.S. 956 (1978), a divided panel of the Fifth Circuit held that widespread and extreme unattributed acts of sabotage during the bargaining process constituted, as a matter of law, an in-plant strike, and therefore justified an employee lockout and the hiring of permanent replacements. That issue is not present in this case since, as the court of appeals observed (Pet. App.

23), "the [H]ospital was able to hire replacement employees and remain in operation." Here, the question is whether once a strike is over a hospital can refuse to rehire strikers not specifically identified with strike misconduct. The *Johns-Manville* court did not reach that issue, though it acknowledged the general rule applied by the court of appeals in this case. 557 F. 2d at 1133 n.16. Moreover, the continuing vitality of *Johns-Manville* is suspect. In a subsequent case (*NLRB* v. *Big Three Industrial Gas & Equipment Co.*, 579 F. 2d 304, 313-316 (1978), cert. denied, 440 U.S. 960 (1979)), the Fifth Circuit suggested that *Johns-Manville* should be limited to its facts. "Courts have long been loathe to countenance an infliction of punishment upon many for the misdeeds of a few. * * * The exception created in *Johns-Manville* arose from extreme circumstances—circumstances threatening the economic survival of the plant and effectively denying its use to the employer." 579 F. 2d at 313-314.

A.S. Abell Co. v. *NLRB*, 598 F. 2d 876 (4th Cir. 1979), is similarly inapposite. There, an employer refused to hire a job applicant who, while employed elsewhere, had participated in a strike marked by violence, until it could determine whether the applicant was personally involved in the violence. In concluding that the employer did not thereby violate the Act, the Fourth Circuit did not reject the general rule that protected strikers cannot be denied employment because of their strike activity absent proof of individual misconduct. It merely permitted the employer to delay hiring for so long as was reasonably necessary to make an individualized determination.[4]

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[4]Nor is *NLRB* v. *Fansteel Metallurgical Corporation*, 306 U.S. 240, 252-261 (1939) (Pet. 15) inconsistent with the general rule. The acts of strike misconduct there were attributable to identified employees who seized the plant and refused to leave, and to those who aided and abetted them.

There is no merit to the Hospital's suggestion (Pet. 13-15) that it was free to deny employment to the strikers even after the effective date of the Health Care Amendments because some of the strike misconduct on which the denial was based occurred before the Hospital was brought under the Act's coverage. The Act proscribes discrimination, after the effective date of the Health Care Amendments, against employees of health care institutions aimed at encouraging or discouraging them from membership in a labor organization. 29 U.S.C. 158(a)(3). This proscription applies without regard for when an organizing effort begins or ends. Otherwise, an employer could defeat the congressional intent to afford the protections of the Act to health care employees simply by asserting that its employees engaged in union or concerted activities before the Amendments went into effect. Therefore, even though the court below upheld the Hospital's claim that it was free to deny strikers reinstatement to their former jobs because it had terminated them before it became subject to the Act's coverage (Pet. App. 25-31), the court properly held that the Hospital was not free, after the effective date of the Amendments, to refuse for discriminatory reasons to considered the strikers as new hires when jobs became available (Pet. App. 31-32).[5]

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[5]Nor is there merit to the Hospital's reliance (Pet. 13-14) on an asserted policy of denying reemployment to employees who "voluntarily * * * terminate" their employment without giving notice (A. 207-209, 438). Assuming *arguendo* that the strikers can be said to have voluntarily terminated their employment without notice by striking, the Hospital may not justify present employment discrimination against them by reference to such a policy. *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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